In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1390

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

ALLEN CLAIBORNE, ET AL.,
Respondents,
INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS, AND BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

H. MARTIN HUNLEY, JR.
1800 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 586-1241

MARTIN W. FINGERHUT
233 North Michigan Avenue
Chicago, Illinois 60601

Counsel for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Illinois Central Gulf Railroad Company (named in the original complaint as Illinois Central Railroad Company) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 2, 1978, No. 75-3790 on the docket of that Court.

OPINION BELOW

The opinion of the Court of Appeals, 583 F.2d 143 (1978), appears in the Appendix hereto. The District Court

for the Eastern District of Louisiana published an opinion which appears in the Appendix hereto, only on issue of punitive damages, 401 F.Supp. 1022 (1975).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 2, 1978. A timely petition for rehearing *en banc* was denied on December 18, 1978, (588 F.2d 823), as shown by the Notice of Rehearing Denial appearing in the Appendix hereto, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether punitive damages may be awarded to plaintiffs in a suit under the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e), et seq., combined with suit under 42 U.S.C. § 1981, based on alleged racial discrimination.

2. Where plaintiffs in such a suit charging racial discrimination sue their employer and also their unions and charge both with acts and omissions of racial discrimination contrary to the said statutes, and where the trial court finds against the defendant-employer only while at the same time reaching the factual conclusions in its Findings of Fact: "The defendant unions, although aware of the racial composition of classes in the carman's craft at Mays Yard, took no concerted affirmative action to remedy the situation" whether the Appellate Court on appeal by the employer may properly refuse to consider the employer's contention that it is entitled to bring up before the Appellate Court the question of the union's liability under the facts as shown

in the record on the ground that the defendant employer has failed to cross-claim against the union and that the plaintiffs have not taken an appeal from the judgment of the District Court in the union's favor, and whether the Appellate Court may properly conclude under such circumstances "the unions' liability to the railroad, if any, must be decided in a separate suit".

3. Whether the District Court and the Appellate Court in a suit under the above-named statutes claiming racial discrimination may award back pay on a general formula as to the length of time it took members of the white race to reach promotions when these Courts had evidence in the record, in the form of a flow chart on number and dates of vacancies, admitted in evidence by the trial court and never at any time questioned as to accuracy by plaintiffs; and whether such a method of determining back pay due plaintiffs meets the requirement of the "rightful place" concept as defined by the United States Courts in numerous decisions interpreting the Civil Rights Act of 1964.

4. Whether in a suit for racial discrimination under the above-named statutes by black employees who are admittedly junior on the seniority roster to non-plaintiff black employees, the District Court may award back pay to the plaintiffs on the basis of when, without racial discrimination, they would have been promoted, when, beyond dispute, the non-plaintiff black employees would have been entitled to these promotions as a matter of seniority in preferance to the plaintiff blacks.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

§ 2000 e-2 and § 2000 e-5(g)
(See Appendix for text.)

United States Code, Title 42

§ 1981. (See Appendix for text.)

STATEMENT OF THE CASE

Suit was brought by 28 employees and former employees of the Illinois Central Gulf Railroad Company employed in Mays Yard in Jefferson Parish, Louisiana in the car department. Twenty-one of these plaintiffs were carmen's helpers and seven were laborers. The suit was brought under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* combined with a claim under 42 U.S.C. § 1981. The complaint was that plaintiffs, all of whom are blacks, were discriminated against prior to and subsequent to the effective date of the Civil Rights Act of 1964 in that they did not receive promotions to the job category of carmen as the white employees did. These promotions, it is contended, were given to whites generally in a manner which amounted to illegal racial discrimination. They sought back pay and other relief. Named as defendants were the employer Illinois Central Railroad Company (which during the pendency of the litigation became Illinois Central Gulf Railroad Company) and the two unions of which plaintiffs were members, one covering the seven plaintiff laborers (the International Brotherhood of Firemen and

Oilers, Helpers, Roundhouse and Railway Shop Laborers) and the other covering the twenty-one plaintiff helpers (The Brotherhood of Railway Carmen of the United States and Canada).

After trial on the merits the trial court found illegal racial discrimination and awarded back pay, punitive damages of $50,000.00 and other relief against the defendant railroad and dismissed the suit as to the defendant unions. The defendant railroad appealed and the plaintiffs appealed also, but only as to the sufficiency of the attorney's fees awarded by the trial court judgment. The United States Court of Appeals, Fifth Circuit, affirmed the finding of racial discrimination and the award of punitive damages but remanded the case of recalculation of the amount of back pay due each plaintiff under certain guidelines set out in its opinion. The Appellate Court also rejected the railroad's contention that its flow chart (Exhibit IC-D), showing dates on which vacancies occurred and promotions were made in the carmen's ranks, showed the plaintiffs' rightful place, notwithstanding that the truthfulness and accuracy of this flow chart was never at any time questioned by either the plaintiffs or the co-defendant unions. Further, the Appellate Court refused to consider the contention of the petitioner-railroad that there was before the Court through the appeal, the question of the liability of the dismissed defendant unions whom the railroad sought in the appeal to hold jointly liable with it unto the plaintiffs. The Appellate Court took the position in its opinion that since the railroad had not cross-claimed against the co-defendant unions, it was not entitled to relief in this regard through the appeal, stating "The unions' liability to the railroad, if any, must be decided in a separate suit". No authority was cited for this conclusion of

law.

The foregoing questions were raised by petitioner-railroad in petition for *en banc* rehearing which was denied.

REASONS FOR GRANTING THE WRIT

1. IN HOLDING THAT PUNITIVE DAMAGES MAY BE AWARDED IN A CLAIM UNDER THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000(e) *ET SEQ.* AND 42 U.S.C. §1981, THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Neither statute provides for punitive damages as a remedy. The Sixth Circuit in *EEOC v. Detroit Edison Company*, 515 F.2d 301 (1975) and the Tenth Circuit in *Pearson v. Western Electric Co.*, 542 F.2d 1150 (1976), both held that punitive damages may not be awarded under these statutes. Further, it appears from comments in an opinion of the Fourth Circuit, it is in line with the holdings of the Sixth and Tenth Circuits to the effect that punitive damages are not allowable in cases of this nature. *Russell v. American Tobacco Co.*, 528 F.2d 357, at 366 (1975). We refer the Court further to its own decision in *Johnson v. Railway Express Agency*, 421 U.S. 454, at 458 95 S.Ct. 1716, at 1719, 44 L.Ed.2d 295 (1975).

The contrary view, in accord with the Fifth Circuit's opinion below was held by the Eighth Circuit in *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 883-4, *cert. den.* 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed.2d 176 (1977).

We submit that it is appropriate for this Court to grant our petition in order that this conflict among the circuits be resolved.

2. THE COURT BELOW ERRED IN REFUSING TO CONSIDER, ON THE RAILROAD'S APPEAL, THE QUESTION OF THE LIABILITY OF THE CO-DEFENDANT UNIONS ON THE GROUND THAT THE RAILROAD HAD NOT CROSS-CLAIMED AND THE PLAINTIFFS HAD NOT APPEALED FROM THE DISMISSAL OF THESE CO-DEFENDANT UNIONS BY THE TRIAL COURT.

In its opinion, the Fifth Circuit refused to consider the railroad's claim that the trial court's judgment in favor of the defendant unions should be reversed and the unions held jointly liable with the railroad unto plaintiffs. The reasons cited by the Appellate Court for its refusal to consider the railroad's claim in this regard was that the railroad had not cross-claimed for contribution and that the plaintiffs had not appealed from the trial court's judgment in favor of the unions. In its opinion, the Fifth Circuit stated (erroneously, we submit): "It is elementary that we ordinarily may not review issues presented for the first time on appeal."

The question of the culpability of the unions was raised in the pleadings by plaintiffs and was supported by evidence throughout the trial. *It was not something that was raised for the first time at the appellate level.* The trial court had listed among its Findings of Fact (Paragraph 37) the following:

> "The defendant-unions, although aware of the racial composition of the classes in the Carmen's Craft at Mays Yard, took no concerted affirmative action to remedy the situation. Nevertheless, the unions did fulfill their formal obligations of representation when properly presented with grievances by plaintiff/members."

The Fifth Circuit in its opinion cited no authority for its conclusion. The Court had before it all of the facts which might have been developed even if there had been a cross-claim by the railroad at the trial level, facts which had been developed in an adversary proceeding at the trial. Since this is so, it is unsound and unjust, we submit, to hold that the petitioner-railroad must now file a separate proceeding against the co-defendant unions to determine issues which are already susceptible of determination in the record, issues which were litigated through adversary proceedings as our system of justice contemplates. Nothing would have been added to the issues of fact and law, and nothing detracted, had the railroad made a cross-claim against the unions.

As pointed out, the opinion of the Fifth Circuit cited no authority for its conclusion in this regard. We have been unable to find judicial or legislative authority on either side of this question but we submit that it was error for the Appellate Court below to refuse to consider the liability of the co-defendant unions toward plaintiffs and toward the petitioner-railroad for bearing part of this award, because all of the facts were presented and presented in an adversary posture at the trial level. The railroad's contention that the unions should be held liable with it to plaintiffs created no new issues for the appellate court to decide, nor did it constitute a surprise for the unions. There was obviously some substantial evidence of culpability on the part of the unions as shown by the trial court's finding of fact quoted above. According to this finding, the unions did nothing but fulfill their formal obligations of representation to the plaintiffs of processing written grievances (none were made by plaintiffs to the unions in this case).

Even before the passage of the Civil Rights Act of 1964 this Court held that unions acting as collective bargaining agents for employees had a strong and clearly defined duty under the law to assure that contracts negotiated by them for the benefit of their members were executed in a non-racially discriminatory manner. *Steel v. Louisville and Nashville Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944), *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). The same view, expressed in even stronger terms, has been held by the appellate courts with regard to the obligations of unions in suits under the Civil Rights Act of 1964 and under 42 U.S.C. § 1981. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 797 (C.A.D.C. 1973); *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Guerra v. Manchester Terminal Corporation*, 498 F.2d 641, 655 (5th Cir. 1974); *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

In the *Carey* case, *supra*, the court stated:

> "We therefore conclude that the ineffectual passivism manifested by Local 275 in its relations with Greyhound served to facilitate the continuing pattern of racial job discrimination at the New Orleans Terminal, and we hold that this facilitation

> violated plaintiff Carey's right to equal employment opportunity as guaranteed by Title VII."

The Fifth Circuit further held in *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 61 (1974), cert. granted sub. nom. *Teamsters Local Union 657 v. Rodriguez*, 96 S.Ct. 2200 (1976) that once the plaintiff has presented a "prima fascie case of hiring discrimination and proof that the seniority system, a creature of the Collective Bargaining Agreement, transmitted the discrimination into the present" the burden is shifted "to the defendant unions to show that the present discriminatory effects were unavoidable, that is, required as a business necessity".

In *Sagers v. Yellow Freight System*, 529 F.2d 721 (5th Cir. 1976) the Court quoted with approval from the District Court opinion in *Sabala v. Western Gillette, Inc.*, 362 F.Supp. 1143, *aff'd.* 516 F.2d 1251 (5th Cir. 1975), the following:

> "...these union organizations have a duty under Section 1981 to inquire into the effect of the contract provisions when it is reasonable to assume, as it is here, that they might lead to discrimination. Union members under Section 1981 have an affirmative obligation to protect members from illegal discrimination ..."

In light of the strong duty imposed on the unions by law, including numerous decisions of the Fifth Circuit, it seems likely that that Court would have granted the railroad's plea for relief by including the union in the award if it had felt that it could reach that point. However, the Court below, erroneously we submit, concluded that it could not reach

the point because the railroad had not cross-claimed against the unions and the plaintiff had not appealed the dismissal by the trial court of the unions.

We submit that the railroad, as appellant before the Fifth Circuit, should have been given whatever relief the record showed it was entitled to with regard to issues and facts fairly presented by the pleadings and litigated at the trial court in an adversary posture, as least as between plaintiffs and the unions. This court should grant the petition for certiorari to compel the Fifth Circuit to consider the railroad's contention that the unions be included along with the railroad in the judgment in favor of plaintiffs.

3. THE COURT BELOW, IN REJECTING THE RAILROAD'S FLOW CHART, THE ACCURACY OF WHICH WAS NOT DISPUTED BY PLAINTIFFS, FAILED TO FOLLOW THE CONCEPT OF "RIGHTFUL PLACE" ESTABLISHED BY ITS OWN DECISIONS AND THOSE OF OTHER CIRCUITS.

Where specific undisputed evidence is available in racial discrimination employment cases as to the "rightful place" of the plaintiff, this information should be used in calculating back pay awards. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 252 (5th Cir. 1974); *U.S. v. Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973); *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251, 1257 (5th Cir. 1975); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974); *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir. 1971).

The flow chart (Exhibit IC-D) was admitted in evidence and was not at the trial, in post-trial motions, or at the appellate level disputed in any way by plaintiffs as to its accuracy. It showed the dates on which vacancies in the carmen's rank (the promotion to which was the central issue in plaintiffs' suit) were filled, the date each was filled, and the name of the employee who filled each vacancy. The position of the railroad was that even if the plaintiff blacks had been given every one of these vacancies in order of their own seniority, to the exclusion of all whites, this was the most favorable "rightful place" to which they could aspire in calculation of back pay awards. Following this flow chart the total back pay to which plaintiffs could lay claim is $152,384.90, while the award made by the trial court under a general formula of granting back pay to a period of six months after hire was $379,077.32.

We recognize that in calling the court's attention to this question we are contending that the Appellate Court as well as the trial court reached an improper conclusion on undisputed facts. Nevertheless, we feel justified in raising the point in this petition because we submit that the awarding of back pay in an amount more than twice what plaintiffs would have been entitled to even if they had been granted promotion to every vacancy which occurred, to the exclusion even of all white employees, is such a serious miscarriage of justice as to amount to the taking of the railroad's property without due process of law and to the granting of additional punitive damages in disguise.

4. THE COURT BELOW ERRED IN HOLDING THAT PLAINTIFF BLACKS, ADMITTEDLY JUNIOR TO NON-PLAINTIFF BLACKS ON THE SENIORITY ROSTER, WERE ENTITLED TO BACK PAY ON THE BASIS THAT PLAINTIFFS HAD NOT RECEIVED PROMOTIONS WHEN IN FACT, IF THERE HAD BEEN NO RACIAL DISCRIMINATION, THE PROMOTIONS WOULD NOT HAVE GONE TO PLAINTIFF-BLACKS, BUT RATHER TO THE MORE SENIOR NON-PLAINTIFF BLACKS.

The seniority rosters offered in evidence, not in dispute, Exhibit IC-9, showed that there were forty black non-plaintiff laborers senior to the seven plaintiff black laborers who were furloughed. These seven plaintiff black laborers, in addition to the twenty-one plaintiff black helpers, were held by the trial court to be entitled to back pay on the basis of dates on which they would have had promotions in the absence of racial discrimination. The trial court did not certify or describe a class. The seniority rosters were offered in evidence by plaintiffs and they were not in dispute as to accuracy. These rosters showed that there were forty non-plaintiff black laborers, still employed by the railroad, senior to the seven plaintiff black laborers who had been furloughed. It is elementary that if promotions were to be made of laborers, these forty non-plaintiff blacks would have had preference due to their seniority over the seven plaintiff blacks. The plaintiff laborers therefore were given back pay based on dates of promotion which under no circumstances they would have been entitled to.

The Appellate Court below remanded the case for recalculation of back pay in light of guidelines set out but it erred

in not holding that these plaintiff black laborers would not be entitled to back pay awards based on promotions (held to have been denied because of racial discrimination) to which they would never have been entitled even in the absence of racial discrimination because these promotions would have gone to the non-plaintiff blacks according to the seniority roster.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

H. MARTIN HUNLEY, JR.
1800 First Nat'l Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Telephone: (504) 586-1241

LEMLE, KELLEHER,
KOHLMEYER &
MATTHEWS
Of Counsel

MARTIN W. FINGERHUT
233 North Michigan Avenue
Chicago, Illinois 60601

Counsel for Petitioner

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Respondents.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the petition for writ of certiorari were mailed, postage prepaid, to counsel of record for all parties, this 9th day of March, 1979 as follows: steven R. Plotkin, Esq., 9th Floor, 305 Baronne Street, New Orleans, attorney for plaintiffs; Louis A. Gerdes, Jr., Esq., Suite 103, 1821 Orleans Avenue, New Orleans, attorney for plaintiffs; Victor H. Hess, Jr., Esq., 1411 Decatur Street, New Orleans, attorney for co-defendant International Brotherhood of Firehood and Oilers, Helpers, Roundhouse and Railway Shop Laborers; and Donald W. Fisher, Esq., 740 National Bank Building, Toledo, Ohio 43604, Attorney

for co-defendant Brotherhood of Railway Carmen of the United States and Canada.

H. MARTIN HUNLEY, JR.
1800 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 586-1241

Counsel for Petitioner

APPENDIX A

OPINION AND JUDGMENT OF COURT OF APPEALS

Allen CLAIBORNE et al., on behalf of themselves and all other persons similarly situated, Plaintiffs-Appellees, Cross-Appellants,
v.
ILLINOIS CENTRAL RAILROAD et al., Defendants-Appellants, Cross-Appellees.

No. 75-3790.

United States Court of Appeals,
Fifth Circuit.

Nov. 2, 1978.

Rehearing and Rehearing En Banc
Denied Dec. 18, 1978.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before RONEY, RUBIN and VANCE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

This appeal concerns principally the method of calculating the compensatory damages due black employees discriminated against by a railroad and whether or not they are due punitive damages. Twenty-eight black employees[1] at Illi-

1. As to one plaintiff laborer, Tom Mason, no proof was introduced and no samages awarded.

nois Central Railroad's Mays Yard in Jefferson Parish, Louisiana filed this action [2] against the railroad and two unions of which they were members, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, and 42 U.S.C. 1981, alleging racial discrimination in the operation of the railroad's job classification and promotion system, and in the railroad's furloughing of the plaintiffs in 1969. The trial court upheld all claims against the railroad, and dismissed all claims against the unions. The railroad, conceding that the trial court's findings of discrimination are not clearly erroneous, disputes its calculation of back-pay, its award of punitive damages, and the dismissal of claims against the union. The employees seek only in increase in the amount of attorneys' fees awarded. We affirm the award of compensatory and punitive damages, but remand for recalculation of the amount due each plaintiff. We deny additional attorneys' fees for work in the trial court but remand for an award of fees for this appeal and for subsequent trial court proceedings.

I. Factual Background

The plaintiffs in this suit are 21 carmen's helpers, also called "oilers," and 7 laborers, who, until November, 1969, were employees of the railroad at Mays Yard. Together with 9 other train yard or "prepare track" employees, the plaintiffs were furloughed in 1969 after a work efficiency study

2. Although denominated a class action in the plaintiffs' original complaint, this suit has not proceeded as a class action, and no class was ever certified.

had been undertaken by the railroad's management.[3]

The railroad's long-standing collective bargaining agreements with the union classed employees of the Mays Yard Car Department into four categories: carmen, carmen apprentices, carmen's helpers, and laborers.[4] Carmen were more highly paid than apprentices or helpers, who were, in turn, more highly paid than laborers. The only promotions of right to the carmen's rank accrued to carmen apprentices. Helpers might be upgraded at the discretion of the railroad; no one could be upgraded if qualified apprentices were available for carmen's work.

The plaintiffs' central assertion is that, from 1954 until 1969, the railroad administered its recruiting and promotional system so that in fact all persons classified as carmen were white. This was accomplished by recruiting only white employees to the apprentice class, while all black employees were hired as helpers or laborers; only apprentices and white workers from other classes at Mays Yard were made carmen. The plaintiffs sought to establish the equal or greater qualifications of those black helpers and laborers whom the railroad declined to upgrade, and argued that the railroad had discriminated on the basis of race, in violation of 42 U.S.C.

3. The Mays Yard study was part of a systemwide operational review undertaken for the railroad by Science Management Corporation. The review, the intent of which is not at issue, resulted in changes in work allocation throughout Illinois Central's operation, and was not limited to trainyard workers.

4. The laborers belong to the defendant international Brotherhood of Firemen and Oilers, Helpers, Roundhouse and Railway Shop Laborers. The three other groups belong to the defendant Brotherhood of Railway Carmen of America.

§2000e-2(a)(1),[5] with respect to the terms and conditions of the plaintiffs' employment.

The trial court upheld the plaintiffs' claims of racial discrimination in an unpublished decision. The court further found that certain of the 1969 furloughs were themselves racially motivated. Although the court concluded that some of the furloughs were not racially premised, it held that these also violated Title VII because the railroad's prior failure to promote the furloughed plaintiffs according to their qualifications deprived them of such job protection as carmen's rank and seniority would have afforded them in a mass layoff.

Having made findings as to the plaintiffs' qualifications to become carmen, the discriminatory acts of the railroad, and the effects of those acts on the plaintiffs' job status and furloughs, the court awarded damages and other relief as follows:

First, having determined that all the plaintiffs were qualified to become carmen on July 2, 1965, or six months subsequent to their dates of hire, whichever came later, the court awarded to each plaintiff the difference between his

5. 42 U.S.C. § 2000e-2 reads, in part:

(a) . . .It shall be an unlawful employment practice for an employer-
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

wages and carmen's wages beginning from either one year prior to the filing of the EEOC complaint or his date of qualification, whichever came later, and continuing to the date he was put on furlough.[6]

Second, the court awarded the same pay differential to each plaintiff from the date he was furloughed to the date of his reinstatement as a carman with full seniority.

Third, the court ordered the railroad to make such contributions to the employees' retirement funds as it would have made had the plaintiffs been paid originally as ordered in the court's judgment. In cases in which a plaintiff declined to make his employee contribution to such funds, the railroad was ordered to pay the equivalent of its contribution to the employee directly.

Fourth, based on the average time by which the court found white employees had qualified for carmen's positions, the court ordered plaintiffs hired prior to 1960 to receive carmen's seniority beginning three years from their dates of hire, and plaintiffs hired after 1960 to receive such seniority starting six months from their start of work.

In addition, the court awarded the plaintiffs attorneys' fees and $50,000 in punitive damages.

6. "The period for which back pay should begin is determined by July 2, 1965 or the statute of limitations, whichever is later." *Pettway v. American Cast Iron Pipe Co.*, 5 Cir. 1964, 494 F.2d 211, 258. In this case, the one-year statute of limitations was tolled by the filing of an EEOC complaint on August 4, 1967; the backpay period for all plaintiffs except Tanner thus began, in the trial court's calculations, on August 4, 1966.

The railroad challenges the court's calculations as to compensatory damages. We will first consider the appropriateness of the back-pay awards, and analyze the findings of fact on which each award rests. We will then discuss the remaining issues in the case: punitive damages, the unions' liability, and attorneys' fees.

II. Damages: What is the Rightful Place?

[1] The award of damages to each plaintiff, equal to the difference between his and carmen's pay for the period between August 4, 1966, or his date of hypothetical qualification for promotion, and each plaintiff's date of furlough, depends essentially on three factual conclusions: on August 4, 1966, or on some later date, each plaintiff was qualified to work as a carman; none of the plaintiffs was promoted, and this was a result of racial discrimination; and, in the absence of discrimination, each plaintiff would have been promoted on the date he qualified for the position. We consider these conclusions in turn.

First, there was abundant evidence to support the trial court's finding that the plaintiffs were qualified for promotion. This was based in part on his conclusion, also supported by evidence, that, despite variations in the description of the tasks of carmen and those of laborers and helpers contained in the relevant bargaining agreements, the actual tasks of carmen and helpers in Mays Yard were largely fungible. Black helpers frequently did the same work as carmen. Some successfully served as carmen while white employees were on vacation or sick. Some of the black helpers had performed carmen's tasks for other railroads. Occasionally, black helpers trained white carmen and carmen apprentices.

There was no evidence that white apprentices or white laborers who had been recruited to apprenticeship and who were later promoted to carmen status were any more qualified in any respect than the blacks passed over for promotion. The black plaintiffs who, after 1969, accepted reinstatement as carmen for the railroad received no additional training to enable them to perform their tasks; neither did those laborers who were reinstated. The railroad has not pointed to any difficulties it has had in recruiting blacks from the laborers' group to become apprentices and then carmen. Far from being clearly erroneous, the court's conclusions as to the plaintiffs' qualifications were virtually compelled by the record.

Similarly, the court's findings of racial discrimination are amply supported. Although neutral on its face, the job classification and promotional system in effect between 1965 and 1969, in which the existence of a predominantly white apprentice class effectively blocked the upgrading of black helpers and laborers,[7] operated at the very least to " 'freeze' the status quo of prior discriminatory employment practices," *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424,

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7. Mays Yard, as stated above, employed four classes of employees in its car department in 1965. The highest paid job was that of carman. Carmen were ordinarily recruited from the ranks of apprentices, who were expected to serve four years before entering the carmen's ranks. Where more carmen were needed than could be supplied by four-year apprentices, apprentices with less than four years' service could be "set up" as carmen. Such "set-up carmen" received carmen's pay, but would not enter the carmen's seniority roster until four years from the start of their apprenticeships. If carmen were needed and no apprentices were available, qualified helpers could be set up. In addition, qualified laborers could be recruited as apprentices or promoted to helpers, and could then be set up. The set up of nonapprentices, however, depended on the unavailability of apprentices for promotion. The upgrading of laborers, like the recruitment of new apprentices "off the street," depended on management's judgment as to qualifications, not seniority.

430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158, 163, in violation of Title VII. The railroad has failed to demonstrate any business necessity as justification for its maintenance of a promotional system with discriminatory impact. *Parson v. Kaiser Aluminum & Chemical Corp.*, 5 Cir. 1978, 575 F.2d 1374, 1389; *Pettway v. American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 244. Furthermore, in view of the fact that an apprentice class existed, the railroad discriminated after 1965 in its failure to hire or upgrade sufficient blacks to apprentice positions.

The calculation of damages must be based on these well-supported premises. The railroad first contends that the trial court failed properly to follow those equitable principles that govern the implementation of relief in Title VII cases. *Albermarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280. Specifically, it asserts that, in calculating back-pay as though each plaintiff were promoted on his date of qualification or the date to which the applicable statute of limitations runs, the trial court ignored the "rightful place" doctrine, under which "injured workers must be restored to the economic position if which they would have been *but for* the discrimination." *Pettway v. American Cast Iron Pipe Co., supra*, 494 F.2d at 252. According to the railroad, only a limited number of vacancies for carmen were available from 1966 on, and damages must be calculated by determining historically which plaintiffs would have succeeded to those positions as they became vacant, and then awarding back-pay only from the dates of the plaintiffs' hypothetical promotions.

The employees do not dispute the need for historical reconstruction, but they view the relevant history differently.

In their and the trial court's view, work assignments at Mays Yard did not reflect a fixed number of slots to be filled by members of each of several well-defined crafts. Rather, carmen, apprentices, and helpers did essentially similar work; whites doing this work were promoted to carmen's rank upon completion of a period of apprenticeship and blacks were not, even when qualified to do and doing carmen's work, solely because of their race. Based on the railroad's treatment of whites, that is, the creation of a carman's slot for every qualified white person, the "rightful place" of each black employee was to be a carman on the day he became fully qualified. This interpretation by the trial court accurately reflects the "rightful place" principle, and is based on factual conclusions that are not clearly erroneous.

[2] We said in *Watkins v. Scott Paper Co.*, 5 Cir. 1976, 530 F.2d 1159, 1168, *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139:

> The rightful place theory is an equitable accommodation between two countervailing interests. The first interest is that of prior discriminatees to achieve what would have been theirs in the absence of discrimination. The countervailing interests are those of employers, employees, and consumers--in maintaining safety and efficiency--and those of employees who acquired their positions within the discriminating system and who would suffer unfairly if required to give up such positions to members of an affected class.

(Citation and footnote omitted.) The aim of Title VII relief, whether back-pay, retroactive seniority, or other injunctive relief, is thus to make whole the victims of dis-

crimination according to what would have been their experience in a non-discriminatory work setting.

[3] We do not require, however, an inflexible and unrealistic reconstruction of the plaintiffs' work history in implementing the rightful place doctrine.

> [I]n computing a back pay award two principles are lucid: (1) unrealistic exactitude is not required, (2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer.

Pettway v. American Cast Iron Pipe Co., supra, 494 F.2d at 260-61 (footnotes and citation omitted). *Accord, United States v. United States Steel Corp.,* 5 Cir. 1975, 520 F.2d 1043, 1050, *cert. denied,* 1976, 429 U.S. 817, 97 S.Ct. 61,50 L.Ed.2d 77. The details of the approach must vary with the case. *See Pettway v. American Cast Iron Pipe Co., supra,* 494 F.2d at 261. In *United States v. United States Steel Corp., supra,* we said:

> [T]he district court, with the assistance of the parties, should strive to the fullest practicable degree to award back pay by reconstructing hypothetically each eligible claimant's work history. . . . To the extent that actual, historical vacancies in the employer's workforce can be flowcharted with reasonable accuracy, the court should award the back pay to the minority employees who, in sound judgment, would have occupied those vacancies but for discrimination, and whose projections show a loss of wages. Part of "[t]he key is to avoid . . . granting a windfall to the class at the employer's expense . . . ." *Pettway, supra,* at 262 n.152. Therefore, if the parties can reasonably reconstruct the history of the changes in the . . . workforce, the court should utilize those data for identifying "vacancies" in light of its decree, and should not presume that additional vacancies occurred. Apart from protecting the defendant, this method has the virtue of distrubting the recovery to the victims who, by the greater likelihood, are entitled to it.
>
> On the other hand, the remainder of "the key" is to avoid "the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly." *Id.*

520 F.2d at 1055. In *United States Steel,* the risk of a potential windfall was especially acute; the plaintiff class comprised over 3,000 black employees and the employer's work force was organized along intricate lines of job progression and overlapping systems of seniority. In the present case, the hypothetical promotion of each of the 27 plaintiffs on the date he became qualified for promotion is not a mere presumption of additional vacancies; it reflects a realistic reconstruction of the history of the employer's workplace, with due regard for the "make whole" purpose of Title VII and the rightful place theory.

The factual conclusions underlying the trial court's determination of the plaintiffs' rightful places are not clearly erroneous. The trial court found that sufficient carmen's work existed to permit all plaintiffs to have been promoted; this conclusion is buttressed by the court's findings that carmen and helpers shared a pool of tasks, with the black plaintiff helpers often doing carmen's work, but at helper's pay. The court further found that, since 1960, all the white

employees have been upgraded as soon as they were qualified. Indeed, of 107 white laborers hired from 1960 to 1971, all but one who remained with the railroad were made carmen. Only four or five of the 31 black laborers hired in that period were made apprentices.

Finally, the employer's effort to "flow-chart" the vacancies in the carmen's craft since 1966 belies any historical certainty inherent in that approach. The proffered flowchart indicates that between 1965 and 1969, 15 vacancies in the rank of carmen occurred because of resignation or retirement. Yet 27 employees were promoted to carmen's positions in that time. The first black employee so promoted was upgraded on August 30, 1967, after the EEOC complaint from which this action arose was filed. Twenty-two persons were promoted before any plaintiff in this case was upgraded. Given these facts, the railroad's assertion that the flowchart presents a picture of actual vacancies based on resignations, retirement, or work availability is merely a competing hypothesis that does not require reversal of the trial court's approach, which is based on substantial evidence.

III. Damages: The Effect of Failure to Seek Promotion

The court's determination, however, that the plaintiffs historically should have been promoted on the dates they became qualified does not in all cases warrant the calculation of back pay from those dates. Some of the plaintiffs did not formally apply for apprentices' or carmen's positions. This must be taken into account in calculating back pay in the light of *International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396,

rendered after the trial court's disposition of the case.

[4,5] The teaching of *Teamsters*[8] is that an employee who is a victim of discrimination is due redress from the date he sought relief from his employer and was denied it as a result of the employer's discriminatory policy; the employee's failure to seek relief permits redress from an earlier date only if the employee can prove that he was deterred from applying by the employer's inflexible discriminatory policies:

> A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.

Id. at 365, 97 S.Ct. at 1869, 52 L.Ed.2d at 433-4.

> [A]n incumbent employee's failure to apply for a job is not an inexorable bar to an award of retroactive seniority. Individual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly.

Id. at 364, 97 S.Ct. at 1869, 52 L.Ed.2d at 433. Such proof requires more than a bare showing that the discriminatees were aware of their employer's discriminatory policies. In deciding an employee was denied promotion as a result of

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8. Although Teamsters involved the award of retroactive seniority, no logical reason supports the application of different principles with respect to awards of back pay, the objective of each remedy is the same, to make victims whole and restore them to their rightful economic places.

discrimination, and not his failure to apply, a court must consider his qualifications, the costs and benefits to him of a change in his work assignment, and the potential sacrifice of the benefits or seniority that had accrued to him based on his past service in the lower position. *Id.* at 364-71, 97 S.Ct. at 1869-73, 52 L.Ed.2d at 433-7.

[6] Because the issue of non-application is significant, and because neither the parties nor the trial court, which rendered its back pay awards three years prior to *Teamsters*, squarely faced the issue, we vacate the court's judgment as to prefurlough back-pay and remand for express findings whether, in view of the railroad's discriminatory policies, the plaintiffs' qualifications, and the potential costs and benefits of accepting promotion, any plaintiff who did not apply for promotion should be treated as an applicant. As to those plaintiffs who did apply on or before the dates from which back pay has been calculated in their cases, the trial court may simply reinstate its prefurlough damages awards *in toto*. The burden of justifying any failure to apply lies with the plaintiffs.

In remanding for findings on this issue, we are aware that the record is not barren. Reviewing the factors mentioned in *Teamsters* with respect to the helpers, we find evidence that the plaintiffs were qualified for promotion; that a carman's position is preferable to a helper's; and that, under the railroad's set-up system, a helper promoted in 1965 or in 1966 would have risked nothing in seniority by accepting a position as set-up carman. For four years, helpers set up as carmen retained seniority as helpers and had to decide only after that time either to revert to helper status or to take the bottom rung on the carmen's seniority roster. Whether each

helper after four years would have decided to become a carman is a purely speculative matter based on an historical contingency--namely, a proper promotion four years earlier--that the railroad prevented from occurring. Because what would have happened is wholly uncertain, and the uncertainty is attributable to the railroad, it must be presumed, in plaintiffs' favor, that they would have chosen to continue to be carmen and to receive the higher rate paid for that position.

If upgraded, the laborers presumably would have sacrificed craft seniority. Although the trial court determined that only two plaintiff laborers would have had more than six months of seniority at the time of their hypothetical upgrading, the testimony of these two, Levester Griffin and Isiah Hill, indicates that both made attempts to secure promotions, notwithstanding any potential loss of accrued benefits.

However, because the issues had not yet been appropriately framed, and not faced directly, the railroad did not submit the evidence it may have had to rebut the plaintiffs' position, now retroactively constructed. Both parties should, therefore, be given the opportunity to adduce any further evidence that might affect whether each employee should accrue back pay from the date of eligibility for promotion or whether it should, in view of any individual's failure to seek a carman's job, be computed only from a later date.

IV. Effect of the Furlough

[7] In addition to awarding pre-furlough back-pay, the trial court awarded each plaintiff the difference between his earnings and carmen's pay for the period between his fur-

lough and "the date he is offered reemployment as a carman with correct seniority status."

Each of the plaintiffs was furloughed from his job at Mays Yard on November 3, 1969 or on December 1, 1969, after a work efficiency study had been undertaken at the direction of the railroad's management. Eight of the furloughed plaintiff helpers worked on the "prepare track," which serviced cars going to or just returning from shippers. The plaintiff laborers also worked on the prepare track, and the remaining 13 plaintiff helpers were employed in the train yard.

The trial court concluded that furloughing the prepare track helpers was racially discriminatory. The work efficiency study of the prepare track recommended a reduction of the work force totalling 16 carmen and 14 laborers. The report did not specifically define "carmen" as including carmen, apprentices, helpers, or any combination. There was testimony, which the trial court credited, that the work on the prepare track done by persons absorbed in these groups was indistinguishable, and that the report intended merely to recommend that 16 persons doing such work by furloughed. This is apparently the way the railroad interpreted it, for it effected the report's recommendations by furloughing all of the helpers, who were black, and only three white carmen. Of the three white carmen furloughed, one resigned and the railroad promoted the two others to other positions. It made no such effort to assist the prepare track helpers to find work. The court's conclusion is thus amply supported.

Because the layoff of the prepare track helpers was racially discriminatory, the court ordered that they receive back-

pay from their date of furlough. It further held:

> In addition, though the furloughing of the other plaintiffs was not racially motivated, it is nevertheless appropriate that they, too, receive such back pay since the furlough had a severe discriminatory racial effect upon them due to the former practices of the defendant. In fact, 32 of the 35 men furloughed were black. The plaintiffs all should have achieved carman status before the date of the furlough, in which case they would have been protected from such a layoff, especially if each had been given his proper seniority date.

As determined by the court, the plaintiffs' proper seniority dates, as carmen, would have been three years from their date of hire for all plaintiffs hired prior to 1960, and six months from their date of hire for all plaintiffs hired subsequently.

Unfortunately, the record before us demonstrates insufficient evidence for the district court to have determined whether each of the plaintiffs would, in fact, have been retained by the railroad had the railroad not discriminated against the prepare track helpers or failed to promote the plaintiffs to carmen's positions at the correct times. Either discharges on account of race, or discharges that would not have occurred but for the railroad's failure to correct its prior discriminatory practices, would violate Title VII. The issue with respect to the calculation of damages is not whether such acts violate Title VII, but whether such discrimination, and not the plaintiffs' lack of seniority, even if properly calculated in this case, made them vulnerable to layoff.

Our difficulty is exacerbated because the *Teamsters* case makes clear that the award of retroactive seniority prior to July 2, 1965 in this case was error. In reversing this court, the Supreme Court unambiguously said: "[N]o person may be given retroactive seniority to a date earlier than the effective date of the Act." 431 U.S. at 356-7, 97 S.Ct. at 1865, 52 L.Ed.2d at 428. The trial court on remand in this case must thus consider whether the plaintiffs, if given seniority as of July 2, 1965 or on their dates of qualification for promotion, whichever came later, would have been protected from a non-discriminatory furlough. To grant relief on any other basis would effectively give the plaintiffs retroactive seniority relief antedating the Act. The basis for an award of reinstatement or back-pay must be to make the plaintiffs whole; to grant such relief unless, but for the railroad's discrimination, the plaintiffs would not have been furloughed, would overstep that target.

In reconstructing the claimants' work history and the likely effects of a non-discriminatory furlough on the plaintiffs, the court must, of course, determine whether the rules by which the seniority rosters were kept after July 2, 1965 operated in any way to lock in the effects of prior discrimination.[9] Specifically, the court must determine whether any plaintiff hypothetically set up as a carman in 1965, more than four years prior to his furlough, could have been compelled, in a non-discriminatory system, to forego those four years of company seniority in entering the railroad carmen's seniority list at the bottom rung four years after being set up. The plaintiffs' history must be hypothesized in a fully non-discriminatory system, purged as far as possible of

9. As the Supreme Court has noted, post-Act seniority relief is essential to the make-whole purposes of Title VII. *Franks v. Bowman Transportation Co.*, 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444.

the effects of pre-Act discrimination, and uncertainties in resolving each employee's rightful place must be determined in the employee's favor.

V. Effect of Offer of Reinstatement

The railroad argues that the cut-off date for any post-furlough back-pay award should be the date of its offer to each plaintiff of unconditional reinstatement. The trial court rejected this contention, holding that no plaintiff should be penalized for rejecting an offer of reinstatement that did not include back pay and seniority relief as well.

[8,9] On remand, the trial court must reconsider the cut-off date for any post-furlough relief it awards, following a course set by principles of equity, which govern Title VII relief. *Albemarle Paper Co. v. Moody, supra.*[10] As the court

10. In rejecting the railroad's position on the effect of offers of reinstatement, the trial court originally adopted the reasoning of *Jurinko v. Edwin L. Wiegand Co.*, 3 Cir. 1973, 477 F.2d 1038. Although *Jurinko* would not be binding on us in any event, the subsequent history of that case buttresses our conclusion that a case-by-case approach to the rejections of offers of reinstatement is appropriate. The Third Circuit held in *Jurinko* that an offer of reinstatement did not necessarily end the effects of past discrimination, and that a refusal to accept such an offer that did not remedy past discrimination was *per se* reasonable. 477 F.2d at 1047. The Supreme Court subsequently vacated the judgment in *Jurinko*, and remanded for reconsideration in light of *Mc Donnell Douglas Corp. v. Green*, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. Judgment vacated, 1973, 414 U.S. 970, 94 S.Ct. 293, 38 L.Ed.2d 214. The Third Circuit, in an unpublished opinion, decided to adhere to its first opinion; then, in a published opinion, it reconsidered and remanded to the district court for findings of fact. 3 Cir. 1974, 497 F.2d 403. The district court reconsidered, but mistakenly followed the Third Circuit's unpublished opinion. The Third Circuit again remanded, 3 Cir. 1975, 528 F.2d 1214, for further consideration of the case, including the effect of offers of reinstatement, in light of *Albermarle Paper Co. v. Moody, supra.* As the Third Circuit said, *Albermarle*

below recognized, each plaintiff bore a duty to mitigate damages. Failure to accept an offer of reinstatement in a Title VII case does not necessarily terminate the right to relief, so long as those amounts earned elsewhere or earnable with reasonable diligence are deducted from each plaintiff's award. 42 U.S.C. §2000e-5(g). In determining whether the right to relief extends beyond the date of an offer of reinstatement, the trial court must consider the circumstances under which the offer was made or rejected, including the terms of the offer and the reasons for refusal. Such reasons as the trial court gave for a *per se* rejection of the railroad's position, for example, the difficulty elderly plaintiffs had in finding substitute work and the disadvantages to them of returning to the railroad without retroactive seniority, would more than justify a *particular* employee in refusing an offer of reinstatement. Whether each employee was reasonable in rejecting reinstatement must be determined separately for every employee who did not accept reinstatement and who, according to the trial court's findings, would not have been furloughed.

VI. Punitive Damages

[10] In addition to compensatory relief, the trial court awarded $50,000 in punitive damages under Title VII and

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(footnote 10 - continued from previous page)

Paper Co. "emphasize[s] the equitable nature of an award of back pay in cases under Title VII of the 1964 Civil Rights Act and the responsibility of the district court to decide each back pay controversy in a way calculated to achieve a just and equitable result in the circumstances of the case before it." 528 F.2d at 1216 (citations omitted).

under 42 U.S.C. § 1981.[11] The railroad, supported by the United States Chamber of Commerce as *amicus curiae*, does not contest that the plaintiffs have established a case for liability under section 1981; rather, they argue that Title VII does not permit the award of punitive damages, and that joining a Title VII claim with a claim under section 1981 does not expand plaintiffs' rights in that respect.

Pretermitting the issue whether an award of punitive damages under Title VII alone would be proper, we are persuaded that such an award under section 1981 is permissible, even when the section 1981 claim is joined with Title VII claims. Although the statement was dictum with respect to the case before it, the Supreme Court said in *Johnson v. Railway Express Agency, Inc.*, 1975, 421 U.S. 454, 460, 95 S.Ct. 1716, 1820, 44 L.Ed.2d 295:

> An individual who establishes a cause of action [for discrimination in private employment] under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.

(Citations omitted.) This interpretation parallels the Court's construction of 42 U.S.C. § 1982, which also makes no specific provision for relief, but under which punitive damages have been allowed. *See Sullivan v. Little Hunting Park, Inc.*,

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11. 42 U.S.C. §1981 reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

1969, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386; *Jones v. Alfred H. Mayer Co.*, 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189.

Without approving or disapproving the lower court's resolution of the Title VII issue, its discussion of Title VII and the different purposes of the Civil Rights Act as compared to the National Labor Relations Act, 29 U.S.C. § 160(c), *Claiborne v. Illinois Central Railroad*, E.D.La. 1975, 401 F.Supp. 1022, is fully persuasive that an award of punitive damages does not so conflict with the purpose embodied in Title VII that it should be disallowed in a combined suit. In so holding we join the Eighth Circuit's conclusion in *Allen v. Amalgamated Transit Union Local* 788, 8 Cir. 1977, 554 F.2d 876, 883-4, *cert. denied*, 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed.2d 176, and respectfully disagree with the contrary view expressed by our colleagues of the Sixth Circuit, *EEOC v. Detroit Edison Co.*, 6 Cir. 1975, 515 F.2d 301, 309, *vacated*, 1977, 431 U.S. 951, 97 S.Ct. 2669, 53 L.Ed.2d 267.

[11] Having determined that a punitive damages award under section 1981 is permissible, we also find no abuse of discretion in the grant of such an award in this case. The railroad's intransigence in failing before this suit was filed genuinely to redress any of its prior discriminatory acts, plus its additional acts of post-Act discrimination, such as testing only black helpers to evaluate their asserted "deficiencies," supports the court's view that the defendant acted with malice with respect to its black employees.

The trial court's judgment with respect to punitive damages is affirmed.

VII. The Claim for Contribution by the Union

[12] The railroad, but not the plaintiff employees, challenge the trial court's conclusion that the unions to which the plaintiffs belonged did not violate their duty of fair representation to minority members. *Steele v. Louisville & Nashville Railroad Co.*, 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L. Ed. 173. The trial court's judgment in this respect is, of course, adverse to any right of contribution against the defendant unions held by the railroad. Had the railroad cross-claimed for contribution below, it would be proper for us to review the court's judgment insofar as it adversely affects the railroad's interests. However, it is elementary that we ordinarily may not review issues presented for the first time on appeal; this rule applies a *fortiori* to claims never presented to the trial court. Because the railroad stated no cross-claim, the unions not only have had no opportunity to present their defenses, if any, to contribution, but also, with the railroad's acquiescence, withdrew in the middle of the hearing below on damages. This case does not fall within that limited class of purely legal issues that may be decided initially on appeal to prevent a miscarriage of justice. *Martinez v. Mathews*, 5 Cir. 1976, 544 F.2d 1233, 1237. The unions' liability to the railroad, if any, must be decided in a separate suit.

VIII. Additional Attorneys' Fees

Finally, we are presented with the plaintiffs' cross-appeal for additional attorneys' fees. In challenging the court's award, the plaintiffs contest only the disallowance of 100 hours charged by each counsel for "miscellaneous" conferences. The plaintiffs assert that, alghough they ordinarily failed to keep time records for work of less than one hour's

duration, they estimated that each attorney spent 24 minutes per week with respect to phone calls, conferences, and the preparation and review of correspondence.

[13] It is familiar law that an award of attorneys' fees and its calculation in a Title VII action are matters left for the sound discretion of trial judges. *E.G., Baxter v. Savannah Sugar Refining Corp.*, 5 Cir. 1974, 495 F.2d 437, 447, *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308; *Johnson v. Georgia Highway Express, Inc.*, 5 Cir. 1974, 488 F.2d 714. As we observed in *Baxter v. Savannah Sugar Refining Corp., supra*, a variety of equitable considerations are involved in awarding attorneys' fees in an employment discrimination suit. Among them is regard for the nature of the action itself:

> Due to the nature of public rights being vindicated, the award should be in such an amount to insure that attorneys will undertake representation in this type of case.

495 F.2d at 447 (footnote omitted).

[14] In the present case, we have noted the total award, the defendants' failure to contest the time claimed, and the purpose of attorneys' fees awards in Title VII. In view of these factors, compensation for the miscellaneous time might have been appropriate but we cannot say that its disallowance was an abuse of discretion. However, additional work has been required of counsel on appeal, and will be required on remand. The district court should, in supplementing its awards of attorneys' fees, take the *Johnson* factors and the nature of the rights being vindicated fully into account. It may require counsel to submit further affidavits or other evidence, if necessary, to assist in this determination.

IX. Affirmance and Remand

The court's judgment of October 16, 1974, with respect to back pay, retirement contributions, and the terms and conditions of reemployment is VACATED, and the case is REMANDED for a redetermination of the amount due each claimant in accordance with the standards set forth above and the additional attorneys' fees due the plaintiffs' counsel. The judgment is in all other respects AFFIRMED.

AFFIRMED in part; Vacated and Remanded in part.

APPENDIX B

OPINION AND JUDGMENT OF DISTRICT COURT

Allen CLAIBORNE et al.
v.
ILLINOIS CENTRAL RAILROAD, and the Brotherhood of Railway Carmen of the United States and Canada.

George J. WESLEY et al.
v.
ILLINOIS CENTRAL RAILROAD, and International Brotherhood of Firemen and Oilers, Helpers, Roundhouse and Railway Shop Laborers.

Civ. A. No. 70-2980.

United States District Court,
E.D. Louisiana.
Oct. 16, 1975.

HEEBE, Chief Judge.

Defendant Illinois Central Railroad moves for a new trial and/or amendment of Findings of Fact and Conclusions of Law on the issue of punitive damages in this case, brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-5(g), and 42 U.S.C. § 1981. This Court has previously awarded plaintiffs $50,000 in punitive damages. We now confirm that decision for the reasons set out below.

There is a clear split in the authority as to whether punitive damages may be awarded in a Title VII employment discrimination case. The leading cases denying punitive damages are *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3139 (U.S. August 14, 1975), and *Van Hoomissen v. Xerox Corp.*, 368 F.Supp. 829 (N.D.Cal. 1973). Cases suggesting they are appropriate include *Dessenberg v. American Metal Forming Co.*, 6 E.P.D. ¶ 8813 (N.D. Ohio 1973) and *Tooles v. Kellogg Co.*, 336 F.Supp. 14 (D.Neb. 1972).

[1] In *Van Hoomissen, supra*, Chief Judge Carter turned first to the legislative history of 42 U.S.C. § 2000e-5(g) to determine whether punitive damages were available. 368 F.Supp. 836-37. After a review of the legislative history, we are unable to agree that it indicates punitive damages are unavailable. Congress never specifically considered the issue. Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1262 (1971). Thus, we must agree with Judge Carter's initial statement that "the 1964 discussion in Congress regarding Section 2000e-5(g) is not terribly illuminating." 368 F.Supp. 836. The Senate analysis of the 1972 amendments to § 2000e-5(g) indicating Congress' attitude in 1972 is not much more explanatory.

> "The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) [§ 2000e-5(g)] the courts have stressed that the scope of relief . . . is intended to make the victims of unlawful discrimination whole . . . (and restore them) to a position where they would have been were it not for the unlawful discrimination." 118 Cong Rec. 3462.

There is no indication that punitive damages are unavailable. Indeed, punitive damages can play a useful role in making victims "whole" by providing compensation for intangibles, *e.g.*, mental suffering. It must also be realized that the grant of seniority rights and back pay does not fully compensate victims because under the rightful place theory incumbent workers cannot be displaced. Punitive damages can provide additional relief for such uncompensated losses. We conclude that the sketchy legislative history of § 2000e-5(g) does not support the conclusion that punitive damages are unavailable.

The *Van Hoomissen* court also indicated that § 2000e-5(g) was modeled upon the National Labor Relations Act, 29 U.S.C. § 160(c), and that punitive damages are unavailable under that Act. 368 F.Supp. 837. With these propositions there can be little dispute, but the key question which must be answered is whether the similarities between the two acts are such that decisions under one control the other.

[2] The original conception of Title VII was that a federal agency with cease and desits powers similar to those of the National Labor Relations Board would enforce nondiscrimination. Comment, Enforcement of Fair Employment Under the Civil Rights Act of 1964, 32 U.Chi.L.Rev. 430, 432 (1965). As a result of a number of compromises, this idea was altered so that the Equal Employment Opportunity Commission had no enforcement powers and was restricted to mediation and conciliation. Private suits in federal court became the primary form of relief, though the Attorney General, and subsequently in 1972 the EEOC, was given the power to bring "pattern and practice" suits. 42 U.S.C. § 2000e-6. Congress, in denying cease and desits

powers to the EEOC, rejected rather than adopted the NLRB scheme originally proposed. It is illogical to conclude from such Congressional action that Congress intended to limit Title VII remedies to those allowed under the N.L.R.A., 29 U.S.C. § 160(c), when it rejected the N.L.R.A. as a model for Title VII enforcement procedures. In fact, if any inference is to be drawn from this, it is that Congress did not intend Title VII to duplicate N.L.R.A. enforcement procedures and remedies.

Moreover, the aim of the N.L.R.A. was to establish a framework within which management and labor could resolve their conflicts, whether by collective bargaining or economic warfare, *e.g.*, strikes and lock-outs. The N.L.R.A. was not meant to be outcome determinative, *i.e.*, it was not to ensure that management or labor wins every conflict. It simply defined permissible methods of engaging in industrial conflict and sought to channel labor/management conflict into peaceful negotiations. Title VII is radically different. It seeks to end all employment discrimination. It does not define permissible methods of discrimination nor does it establish a framework allowing for employment discrimination. Its aim is to be outcome determinative and to see that employees who are discriminated against win every conflict.

Punitive damages under the N.L.R.A. are inappropriate because they would only serve to exacerbate conflict between management and labor within the permissible sphere of industrial conflict, *i.e.*, strikes and lock-outs. The party assessed punitive damages could seek revenge in the next strike or be recalcitrant at the bargaining table. This would undermine the spirit of cooperation that is necessary for good-faith collective bargaining and the peaceful resolution of industrial

conflicts. Such revenge seeking would be almost impossible to prove unless the party accused of it stated this was a reason for its action. Punitive damages might also create a sense of moral superiority in the side receiving them, discouraging that side from negotiating and avoiding strikes because it felt it was "right." Furthermore, punitive damages might permit the N.L.R.B. to destroy the equality of power between management and labor that Congress intended to create by the N.L.R.A. Note, Tort Remedies for Employment Discrimination Under Title VII, 54 Va.L.Rev. 491, 502 (1968).

No such dangers exist under Title VII. Employment discrimination is not negotiable so there is no negotiating process to undermine. Where there is employment discrimination, there is no equality of power to be maintained, since employment discrimination is absolutely prohibited. Finally, there is no permissible area of conflict where revenge for punitive damages might be sought. Indeed, the possibility of punitive damages under Title VII should encourage an end to employment discrimination, *infra*. Accordingly, the profoundly different aims of Title VII and the N.L.R.A. should lead to a different, not similar, decision on punitive damages.

[3] The final argument in *Van Hoomissen* against punitive damages is that Congress in 1968 adopted Title VIII dealing with fair housing and specifically provided for punitive damages. 42 U.S.C. § 3612 ($1,000 maximum). "When the 1972 amendments to Title VII were made, Title VIII was already law, yet no such parallel provision for punitive damages was included, even though *other amendments* to the remedies section were made." 368 F.Supp. 838-9 (their

emphasis). Such reasoning by negative implication is not favored, especially where there is no indication that Congress considered Title VIII when it amended Title VII. *See* Implying Punitive Damages in Employment Discrimination Cases, 9 Harv.Civ.Rights - Civ. Lib.L.Rev. 325, 342 (1974). Whether we assume that Congress in 1964 thought it made punitive damages available or unavailable under Title VII, there was no necessity to amend it in 1972. Since under either assumption Congress' action would have been the same, little can be inferred from its lack of action on punitive damages in 1972. Moreover, Title VIII is not closely related to Title VII, having been adopted in 1968, four years after Title VII was adopted and four years before it was amended so there is no reason to believe that Congress intended one to affect the other. We, therefore, conclude that Title VIII provides no guide to the availability of punitive damages under Title VII.

[4,5] Turning now to the language of § 2000e-5(g), we find that:

> ". . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate."

In *Detroit Edison*, supra, the Court relied on the principle of *ejusdem generis* to conclude that only equitable relief was available. However, we believe this principle must give way in the light of *S.E.C. v. Joiner Corp.*, 320 U.S. 344, 351, 64

S.Ct. 120, 123, 88 L.Ed.2d 88 (1943) (*ejusdem generis* and *expressio unius* must be "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating purpose") and *Peyton v. Rowe*, 391 U.S. 54, 65, 88 S.Ct. 1549 20 L.Ed.2d 426 (1967) ("Remedial statutes should be liberally construed"). It was the intent of Congress to create "broad and effective remedies." Sape and Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo.Wash.L.Rev. 824, 880 (1972). Since punitive damages would further the aims of Title VII by detering violations and by encouraging plaintiffs to seek relief by increasing their recovery, the implication of punitive damages will further the broad remedial effect that Congress intended under Title VII.

[6] In *Detroit Edison, supra,* it is also argued that the award of punitive damages violates the constitutional right to trial by jury. However, punitive damages can be awarded by a *judge* in a proceeding for legal relief. *Swofford v. B & W, Inc.*, 336 F.2d 406, 411-14 (5th Cir. 1964), *cert. den.*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965); *Pan American World Airways, Inc. v. Ramos*, 357 F.2d 341, 342 (1st Cir. 1966); *Kennedy v. Lakso Co.*, 414 F.2d 1249, 1254 (3rd Cir. 1964). Since the merger of law and equity there seems to be no reason that punitive damages cannot be awarded by a judge in an equitable proceeding. Accordingly, since the award of punitive damages does not require a jury trial under the Seventh Amendment, there is no constitutional barrier to the award of punitive damages by a judge in an equitable proceeding. Developments–Title VII, 84 Harv.L. Rev. 1269, *supra.*

[7] Defendant ICRR signed the first pre-trial order of

March 21, 1972, which governed the trial on liability, and it signed the second pre-trial order of December 5, 1973, which governed the trial on relief. Both of those orders provided for a non-jury trial. During the extended course of this litigation, which began in 1970, defendant ICRR never requested a jury trial. The cases and commentaries cited in this opinion, indicating the possibility of punitive damages, should have put ICRR on notice that such damages could be awarded. Even if we are in error in our holding that a jury trial was not required in this case, ICRR's failure ever to request a jury trial constituted a waiver. Federal Rule of Civil Procedure 38(b) and (d) requires an affirmative demand for jury trial within ten days of service of the last pleading directed to such issue. 5 Moore's Federal Practice 334 (1974).

[8,9] Section 1988 of 42 U.S.C. allows federal courts to apply state law when federal law is not sufficient to remedy or punish violations in civil rights cases. It has been suggested that 42 U.S.C. § 1988 provides a basis for punitive damages if they are available under state law. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969); Tort Remedies, 54 Va.L.Rev. 499-501, *supra*; Implying Punitive Damages, 9 Harv.Civ. Rights–Civ. Lib.L.Rev. 349-351, *supra.* While we are inclined to agree with this argument, we need not decide it since punitive damages are unavailable in Louisiana. *Baggett v. Richardson*, 473 F.2d 863, 865 (5th Cir. 1973).

[10-12] This case was also brought under 42 U.S.C. § 1981, which provides relief from employment discrimination. Our previous findings in this case support the conclusion that ICRR violated § 1981, as well as Title VII, and we so hold. Since *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409,

88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) and *Sullivan, supra,* it has been clear that equitable relief and compensatory damages are available under § 1982 via 28 U.S.C. § 1343(4) and 42 U.S.C. § 1988. 42 U.S.C. § 1981 duplicates § 1982 in that neither makes any provision for relief. We know of no reason justifying different damage remedies under §§ 1981 and 1982. *Mizell v. North Broward Hospital District,* 427 F. 2d 468, 472 (5th Cir. 1972). Since punitive damages are available under § 1982, *Seaton v. Sky Realty Co.,* 491 F.2d 634 (7th Cir. 1974), we conclude that § 1981 provides a separate and independent basis for our award of punitive damages. Johnson v. Railway Express, 421 U.S. 454, 460, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), *Cook v. Advertiser Co.,* 323 F.Supp. 1212, 1213 n. 3 (M. D.Ala. 1971), *aff'd on other grounds,* 458 F.2d 1119 (5th Cir. 1972) and *Tramble v. Converters Ink Co.,* 343 F.Supp. 1350, 1354-55 (E.D.Ill.1972). Even if we assume *arguendo* that punitive damages are unavailable under Title VII, § 1981 was not preempted nor was it repealed by implication when the 1964 Civil Rights Act was passed. *Sanders v. Dobbs Houses, Inc.,* 431 F.2d 1097, 1100-01 (5th Cir. 1970), *cert. den.,* 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971). Accordingly, we must respectfully reject the result reached in *Howard v. Lockheed-Georgia,* 372 F.Supp. 854, 857-8 (N.D.Ga. 1974), which modified § 1981 on the basis of Title VII. Title VII does not alter § 1981 even where there is a strong conflict between these two laws, *i.e.,* Title VII's EEOC conciliation requirement. *Hill v. American Airlines,* 479 F.2d 1057, 1060 (5th Cir. 1973). A *fortiori* Title VII cannot be held to have eliminated punitive damages under § 1981 where Congress expressed no intent to do so.

Accordingly, we affirm our award of $50,000 in punitive damages on the basis of defendant ICRR's conduct as outlined in our findings of June 2, 1974, where we found that ICRR had acted with malice.

TEXT OF 42 U.S.C. § 1981:

§ 1981: Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

TEXT OF 42 U.S.C. § § 2000e-2 and 2000e-5(g):

§ 2000e-2. Unlawful employment practices – Employer practices

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or

instituion of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if --

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentages of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

§ 2000e-5

Inunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

* * * * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, respoisible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

NOTICE OF DENIAL OF REHEARING BY COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

DECEMBER 18, 1978

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 75-3790 - ALLEN CLAIBORNE, ET AL., v.
ILLINOIS CENTRAL RAILROAD, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: s/ Salley Hayward
Deputy Clerk

cc: Mr. H. Martin Hunley, Jr.
Mr. Martin W. Fingerhut
Mr. Gerard C. Smetana
Mr. Steven R. Plotkin
Mr. Louis A. Gerdes, Jr.
Mr. Victor H. Hess, Jr.
Mr. Donald W. Fisher